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No. 83-1650

In the Supreme Court of the United States

October Term, 1983

JONEZ P. SUTHOFF, FRANCES P. MILLER AND INEZ W. PHILIBERT,
Petitioners,

vs.

YAZOO COUNTY INDUSTRIAL DEVELOPMENT CORPORATION; YAZOO COUNTY, MISSISSIPPI; YAZOO COUNTY PORT COMMISSION; YAZOO CITY, MISSISSIPPI; YAZOO PUBLIC SERVICE COMMISSION; WILLIAM BARBOUR; TOM CAMPBELL, JR.; E. A. SMITH; WILLIAM T. NEELY AND JOEL STEVENSON,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 9

ARGUMENT:

I. Preliminary Statement 12

II. The "Borrowing" Rule Relates to Use of State Statutes of Limitations 13

III. The "Essential Nature" of the Action Is the Criterion for Selecting the Right Statute 14

IV. The Correct Statutes Were Selected 14

V. The Correct "Accrual" Rule Was Applied 15

VI. The Correct "Tolling" Rule Was Applied 16

VII. Application of State Statutes of Limitation Does Not Adversely Affect Policies of Civil Rights Legislation 17

VIII. The Case Was Ripe for Summary Judgment 17

IX. There Is No Conflict With Decisions of the Supreme Court or Other Courts 18

X. There Are No Questions Which Warrant Review 20

CONCLUSION 21

Table of Cases

Andrews v. GAB Business Services, Inc., 443 F.Supp. 510 (N.D. Miss. 1977) 14
Board of Regents v. Tomanio, 446 U.S. 478, 100 S.Ct. 1790 (1980) 11, 13, 17
Boshell v. Alabama Mental Health Board, 473 F.2d 1369 (CA 5, 1973) 14
Childers v. Beaver Dam Plantation, Inc., 360 F.Supp. 331 (N.D. Miss. 1973) 14
Cox v. Stanton, 529 F.2d 47 (CA 4, 1975) 16
Lonnie Lee Cuevas v. Nationwide Mutual Fire Ins. Co. (unreported) 15
Dennis v. Travelers Insurance Co., 234 So.2d 624 (Miss. 1970) 14
First Bank of Arizona v. Cities Service Co., 391 U.S. 253, 88 S.Ct. 1575 (1968) 18
Ray Harris v. Combined Ins. Co. of North America (unreported) 15
Harrison v. United States (unreported) 19
Lavellee v. Listi, 611 F.2d 1129 (CA 5, 1980) 16
Prince v. Wallace, 568 F.2d 1176 (CA 5, 1978) 14
Rigby v. Roadway Express, Inc., 680 F.2d 342 (CA 5, 1982) 14
Robertson v. Wegmann, 436 U.S. 584, 98 S.Ct. 1991 (1978) 17
Suthoff, et al. v. Yazoo County Industrial Development Corporation, et al., 637 F.2d 337, reh. den. 642 F.2d 822 (CA 5, 1981) 4, 6, 12
Suthoff, et al. v. Yazoo County Industrial Development Corporation, et al., 722 F.2d 133 (CA 5, 1983) 9, 13, 14, 15, 16

United States v. Kubrick, 444 U.S. 111, 100 S.Ct. 352 (1979) 18, 19
Urie v. Thompson, 337 U.S. 163, 69 S.Ct. 1018 (1949) 19

Statutes

42 U.S.C. §1983 ..... *passim*
Miss. Code (1972) §15-1-35 14
Miss. Code (1972) §15-1-49 14

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PRELIMINARY STATEMENT

This brief responds to the Petition of Jonez P. Suthoff, Frances P. Miller and Inez W. Philibert, for review on a writ of ceritorari.

Petitioners were plaintiffs in the United States District Court for the Southern District of Mississippi and are here sometimes referred to as "plaintiffs" and sometimes as "petitioners".

Respondents were defendants in the trial court and are sometimes referred to collectively as "defendants".

There are ten respondents. Five of these are public and public service bodies identified with the local government and industrial development of Yazoo County and Yazoo City, Mississippi. The remaining five respondents are individuals who are identified in one way or another with the subject matter of the case. Two are the attorneys who were employed by the plaintiffs (Neely and Barbour). One is an appraiser engaged in behalf of the plaintiffs (Stevenson). Another is an attorney for Yazoo City (Campbell).

All respondents (defendants/appellees below) join in this brief, because the one issue involved is common to all defendants.

STATEMENT OF THE CASE

This was a §1983 action, seeking recovery of damages, actual and punitive, for an alleged taking of property by fraud, duress, and abuse of process. The lower Court dealt only with a narrow issue. The issue was whether the action was time-barred, – a claim asserted defensively. The issue was presented for resolution by the motion of defendants for summary judgment. The motion was based upon the facts established by the pleadings and upon the admissions extracted from the three plaintiffs on their depositions.

Petitioners' "Statement of the Case" is mostly fiction, derived from the allegations of the Complaint and wishful thinking of counsel. The defendants dispute all claims of wrongful or fraudulent conduct and assert them to be preposterous in the extreme. For present purposes, how-

ever, these allegations produce no viable issues and are relevant only to deciding the nature of the alleged cause of action for use by the Court in selecting a statute of limitations which best fits those disputed allegations.

The limitations defense involves three questions or sub-issues and three only. These are: (1) when did the alleged cause of action accrue; (2) which statute is to be borrowed from state law; and (3) had the statute run its course before the present action was filed.

As noted in more detail later, the allegations of the untimely Complaint, filed in February, 1979, closely parallel the conviction entertained by the three plaintiffs in February, 1972, when they agreed to sell the land to Yazoo County and gave a deed in exchange for the $100,830.00 agreed price.

The factual background established by the pleadings and uncontroverted summary judgment evidence, is noted below in abbreviated form.

The action sounds in tort, alleging fraud, duress, and abuse of process, allegedly extended to five public and quasi public bodies and five individuals, all named as defendants, under a conclusory allegation of combined action or "conspiracy" to deprive the plaintiffs, three owners of a tract of land in Yazoo County, Mississippi, of their property without due process of law, contrary to the mandate of the Fifth and Fourteenth Amendments to the Constitution of the United States. The Complaint invokes 42 U.S.C. §1983.

The Complaint reflects the plaintiffs' dissatisfaction with the sale by them of a tract of land to Yazoo County in February, 1972. The tract is alleged to contain 122 acres.

On February 22, 1972, after extensive negotiations, the sale of the tract of land was closed by the execution by the plaintiffs of a deed to Yazoo County, as grantee, in exchange for $100,830.00, paid by Yazoo County and accepted by the three plaintiffs as owners. The deed is dated February 18, 1972. The sale was closed February 22, 1972. On February 16, 1979, over six years later, the present suit was filed. The Complaint asserted that the land was sold in 1972 for less than its full value, alleging, as the basis for the recovery of damages, fraud, duress and abuse of process.

Believing that the Complaint had not successfully invoked federal jurisdiction under §1983, defendants moved to dismiss under Rule 12(b)(1) and the United States District Court, expressly without reaching any other issue, dismissed the action without prejudice for want of jurisdiction. However, the Fifth Circuit reversed. *Suthoff, et al. v. Yazoo County Industrial Development Corporation et al.*, 637 F.2d 337, reh. den. 642 F.2d 822 (CA 5, 1981). Certiorari was denied, Justice Rehnquist dissenting, 454 U.S. 1157, 102 S.Ct. 1032 (1982).

On remand, the appellants filed answers denying the allegations of fraud, duress and abuse of process, and pleading, among other defenses, the bar of Mississippi statutes of limitations, waiver and laches. Plaintiff did not seek to lay the groundwork for avoidance of the time-bar plea tendered in defendants' answers by a responsive pleading.

Discovery was commenced and all of the named parties, plaintiffs and defendants, were deposed. While the depositions fail to support a cause of action on the merits, and even suggest that same is frivolous, the same depositions reflect admissions by the plaintiffs which establish the

limitations defense. Therefore, defendants limited the grounds for their motion for summary judgment to the threshold application, as a complete bar, of two Mississippi statutes of limitations.

No response to defendants' motion for summary judgment appears of record. No genuine issue of fact was developed. The District Court (Judge Walter L. Nixon, Jr.) sustained the motion and dismissed the action with prejudice, holding that the action was barred as a matter of law, under both the *one year* and the *six year* state statutes governing tort actions at common law in Mississippi.

The events leading up to the execution of the land deed in February, 1972, are noted below.

Mrs. Inez W. Philibert acquired the tract of land as devisee in the will of a friend, one E. W. Cooper, and deeded a 1/3 interest each to her two daughters, who were coplaintiffs in this lawsuit, and the three ladies owned the land in 1970.

Several appraisals of value were made, — one by Yazoo City and two by the owners, which ranged from $250.00 to $1,500.00 per acre and which varied also as to the number of "usable" acres in the tract. The land was finally sold to Yazoo County for $100,830.00, based on 99.25 usable acres, or at an average price of approximately $1,018.00 per usable acre.*

Between May, 1970, and September 2, 1971, several references to the planning, construction and location of a sewage disposal plant appeared on the minutes of the Mayor and Board of Alderman of the City of Yazoo City,

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*The entire tract was sold but the price negotiated and paid was calculated on the basis of "usable acres".

reflecting the city's interest in the land for locating a sewage plant. On September 2, 1971, the City filed its eminent domain suit to acquire a portion of the Philibert land south of the levee (82.43 acres). This is the suit which plaintiffs claimed to be a pretense and an abuse of process.

Mrs. Philibert and her two daughters had previously employed Mr. William T. Neely, a Jackson, Mississippi, attorney. When the condemnation suit was filed on September 2, 1971, Neely associated Mr. William H. Barbour, an attorney in Yazoo City. The owners made their own investigation into the value of the land. They already had listed the property with a real estate broker for sale at $1,500.00 per acre, after obtaining his own appraisal at that figure. The two attorneys then engaged a qualified appraiser, Joel Stevenson, to place a value on the land, which was close to what it later sold for.

While the City had an interest in a part of the land to establish a sewage plant, the Yazoo County Port Commission (an instrumentality of Yazoo County) had an interest in the entire Philibert tract for industrial development in the area,* if another site could be found for locating the sewage plant, and began negotiating for the purchase of the Philibert tract and also for adjacent land called the Page tract, — the plan being to make a portion of the Page tract available to the City for the sewage plant and retain the Philibert tract for industrial development if both tracts could be acquired.

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*It was asserted that the City filed the eminent domain suit to acquire the land for use by the Yazoo County Port Commission because the Commission had no expropriation powers, but, for whatever it may be worth, this is not the case. The Commission does have the power to acquire land by eminent domain. Cf. Opinion of the Fifth Circuit on Petition for Rehearing in first appeal, 642 F.2d 822 (CA 5, 1981).

Negotiations began between the attorneys for Yazoo County and the attorneys for the owners of the Philibert tract and with the owners of the Page tract, with the result that both tracts were acquired by deed to Yazoo County and the location of the sewage plant was later established by the City on the Page tract.

Although the land had been listed for sale with the broker, Mrs. Philibert and her two daughters were not enthusiastic about selling the land to Yazoo County, and in the course of the negotiations there developed in their own minds certain mental fixations which bear directly upon the issue involved here. These fixations bear upon the issue because they reflect an awareness from the beginning of the existence of the same cause of action which the plaintiffs alleged almost seven years later.

The first mental fixation was that the condemnation suit filed by the City was a fraud and a pretense only and then that they were being tricked and that their attorneys and appraiser were not properly representing their interest. While the record is devoid of any evidence to that effect, the three ladies nevertheless so concluded in their own minds as early as February, 1972, or before and never waivered in their viewpoint.

For example, appellant, Mrs. Jonez Suthoff, who was the acknowledged leader of the family group, testified on her deposition that as early as the meeting on February 3, 1972 (prior to closing the sale on February 22, 1972), she felt like the owners were being defrauded and that their attorneys were defrauding and tricking them.

Based upon the uncontroverted summary judgment evidence, the District Judge found (Apx. pp. 25a-25b):

> "The alleged cause of action accrued in February of the year 1972 when the plaintiffs executed their

Warranty Deed dated February 18, 1972, conveying the land in question to Yazoo County, Mississippi and received from the grantee the sum of $100,830.00.

"On their depositions, the plaintiffs testified to an awareness in 1971 and in 1972 of the alleged wrongs against them and during this period even attempted unsuccessfully to employ another attorney in the person of one John Poole. The Court concludes that plaintiffs either knew the facts underlying their present claims or should have known of facts to be on notice but nevertheless delayed the filing of this action for more than six years thereafter.

"There was no concealment or concealed fraud by any of the defendants and the running of the statutes of limitations was not tolled on the facts in this case.

"The plaintiffs have retained the money paid to them by Yazoo County in exchange for their deed. Yazoo County took possession of the land deeded to it and valuable improvements have been made on the property."

The bare allegations of the Complaint are not enough to create a genuine issue of fact, Rule 56(e), but in this case, the admissions found in the depositions indicate that the pleader had no respect at all for the facts actually involved.

For example, the Complaint alleges that William H. Barbour, one of petitioners' attorneys who was associated with Mr. Neely, another of plaintiffs' attorneys, was an officer in the defendant Yazoo Industrial Development Corporation (YIDC); that plaintiffs were unaware of this fact until January 25, 1979, and that had it been known, Barbour would not have been employed by plaintiffs. On this point the Fifth Circuit found:

"Plaintiffs' primary allegation in this regard is that Barbour and Neeley failed to disclose Barbour's official association with the YIDC, a fact plaintiffs claim not to have learned until January 25, 1979, approximately three weeks prior to their filing the lawsuit.

"The uncontroverted summary judgment evidence, however, taken from plaintiff Suthoff's own deposition testimony, reflects that Barbour's name was mentioned as a member of the YIDC Executive Committee in a November 10, 1971, article concerning the proposed sewage disposal plant in the People's Press, a Yazoo City Newspaper; further, that Suthoff read the article shortly after it was printed and underlined Barbour's name where it appeared in the article. Plaintiffs have not alleged that Barbour or Neely actively concealed the fact of Barbour's association with the YIDC. . ." (722 F.2d at 138)

SUMMARY OF ARGUMENT

The case involved only a single narrow issue. That issue was whether this 42 U.S.C. §1983 action was barred by the applicable statute of limitations.

The District Court selected the Mississippi one-year statute relating to "intentional" torts and, in the alternative selected the state's six-year catch-all statute. Those statutes were borrowed from state law and applied to the uncontroverted facts to dismiss the action as time-barred.

In applying the statutes of limitations, the trial Court determined, on the facts, that the cause of action accrued on February 22, 1972, when the potential plaintiffs knew or should have known of the existence and cause of the

alleged injury. The action was filed over six years later. There was no fraudulent concealment by any of the defendants. The Court of Appeals for the Fifth Circuit affirmed. A Petition for Rehearing was denied.

The case involves the sale in February, 1972 of a tract of land to Yazoo County, Mississippi, by the plaintiffs, as owners. The owners exchanged a land deed at that time for consideration of $100,830.00 in cash. That sum was received by the owners and retained and used. The potential plaintiffs continued to retain and use the purchase monies while the purchaser made valuable improvements on the land.

Plaintiffs filed this action in February, 1979, claiming that in 1972, they had been induced by fraud, duress and abuse of process to sell the land for only a fourth of its true value. Yazoo County was accused along with several other public and quasi-public bodies, plus five individuals, including lawyers on both sides of the 1972 negotiations. Damages, actual and punitive, were demanded.

According to the admissions by the plaintiffs on their depositions, they knew in February, 1972, substantially all of that which they asserted over six years later in their §1983 Complaint.

The time-bar issue involved three sub-issues, which were: (1) when did the cause of action accrue; (2) which statute should be selected; and (3) was the selected statute tolled by alleged concealed fraud.

The standards for resolving the above mentioned issues and sub-issues are now well settled. Those standards were recognized and applied to the facts distilled from the extensive discovery depositions. Those standards were not only applied; they were correctly applied to conclude: (1) that the cause of action accrued in February, 1972 when

the deed was executed; (2) that the applicable statutes were first the Mississippi *one-year* statute relating to intentional torts, and if not the one-year, then the *six-year* "catch-all" statute relating to torts in general; (3) that neither of the selected statutes was tolled on the unsupported arguments claiming the existence of concealed fraud; and (4) that either or both of the statutes serve to bar this action.

Application of limitations, borrowed from state statutes, is appropriate in §1983 actions, as has been consistently held by all courts which have considered the question, including the Supreme Court in *Board of Regents v. Tomanio*, 446 U.S. 478, 100 S.Ct. 1790 (1980).

The use of borrowed statutes of limitations does not violate the policy or purpose of the Civil Rights Act, because plaintiffs can still readily enforce their claims simply by commencing their action on time. This is especially true in the case at bar, since the plaintiffs not only over-delayed on a strictly statutory time lapse basis; they were guilty of laches as well. This is so because they stood by and continued to retain and use the proceeds from the sale while Yazoo County proceeded, without complaint, to make large expenditures for permanent improvements on the land.

No good reason has been advanced why this Court should review the routine findings of the lower courts. There are no new principles to announce or novel issues to resolve. The lower Courts simply selected a state statute to borrow by finding the one most analogous and resolved the accrual issue and the "tolling" contention on the basis of the facts. In short, petitioners have not pointed to any "special or important reasons" for granting the writ, especially since the decision is well supported by reason and authority.

ARGUMENT

I.

Preliminary Statement

Petitioners' attempt to state the questions to be presented under Rule 21.1 is defective, because the questions are not stated in the terms and circumstances of the case.

The Court of Appeals did not "disregard, overrule and convert" its previous holding as stated. The first holding dealt only with the question of jurisdiction under §1983 and related statutes. The Court found that jurisdiction existed but was careful to point out that no other issue was involved. *Suthoff v. Yazoo County Industrial Develcpment Corp.*, 637 F.2d 337, reh. den. 642 F.2d 822 (CA 5, 1981).

On the subsequent and last appeal, the issues presented to the Court of Appeals were (1) whether the action is time-barred by borrowed state statutes of limitations in this §1983 action; and (2) whether the applicable statutes were tolled by contentions of "concealed fraud" when, despite current unsupported assertions, the absence of concealment is established in point of fact without contradiction, as the lower Courts expressly found.

The District Court held that there was no genuine issue of material fact on the one and only dispositive issue involved; that the Mississippi one-year statute, barring actions for intentional torts, applied and, if mistaken, then in the alternative, that the Mississippi six-year "catch-all" statute applied; that either or both statutes served to preclude maintenance of the action; and finally, that neither the one-year nor the six-year statute was tolled on the argumentative contentions of "concealed fraud".

The selection and non-tolling conclusions reached by the District Court were affirmed on appeal by the Fifth Circuit Court of Appeals. *Suthoff, et al. v. Yazoo County Industrial Development Corporation, et al.*, 722 F.2d 133 (CA 5, 1983). No incorrect standards governing the decision or review were used by the lower Courts. No special or important questions for review appear on the surface or even lurk in the background of this case and none of the parameters of Rule 17.1 have been or can be distilled from the record in this case.

II.

The "Borrowing" Rule Relates to Use of State Statutes of Limitations

Petitioners' main argument seems to be that since the alleged tort was one of alleged constitutional proportions, state statutes cannot be used as a time bar. But no authority is cited for this contention. Indeed, the point is foreclosed by *Board of Regents v. Tomanio*, 446 U.S. 478, 100 S.Ct. 1790 (1980), in which a New York statute was held to bar a §1983 action. Since then, many cases have held that federal courts must "borrow" the state statute of limitations governing analogous causes of action. (See cases cited by the Fifth Circuit.) These cases conclude that the application of state created time-bars is not inconsistent with the federal law embodied in §1983, since plaintiffs may readily enforce their claims simply by commencing their actions on time. *Board of Regents v. Tomanio*, supra.

III.

The "Essential Nature" of the Action is the Criterion for Selecting the Right Statute

Once determined that the federal courts may borrow state statutes of limitations, the next step is one of selection. The selection process will first look to the "essential nature" of the action or gravamen of the claim and then select the statute which applies under state law to a claim that is determined to be the most analogous to the plaintiff's claim. *Prince v. Wallace,* 568 F.2d 1176 (CA 5, 1978); *Boshell v. Alabama Mental Health Board,* 473 F.2d 1369 (CA 5, 1973).

The Fifth Circuit followed this process of selection (722 F.2d at 136).

IV.

The Correct Statutes Were Selected

The essential nature of plaintiffs' claim was a mixture of alleged fraud, duress and abuse of process, all intentional torts, and closely related in nature, having in common the element of intentional conduct. In Mississippi, the one-year statutory bar, §15-1-35, Miss. Code (1972), applies to all intentional torts. *Dennis v. Travelers Insurance Co.,* 234 So.2d 624 (Miss. 1970); *Rigby v. Roadway Exp., Inc.,* 680 F.2d 342 (CA 5, 1982); *Childers v. Beaver Dam Plantation, Inc.,* 360 F.Supp. 331 (N.D. Miss. 1973); *Andrews v. GAB Business Services, Inc.,* 443 F.Supp. 510 (N.D. Miss. 1977). Therefore, the one-year statute was the first choice of the lower Court. Under the one-year statute, the action is barred six times over.

The second choice was the Mississippi six-year statute, §15-1-49, Miss. Code (1972), called the "catch-all" statute.

The action was filed over six and almost seven years after the cause of action accrued. It was barred by this statute as well.

The lower Courts made the correct selection under the proper standards. The effort by plaintiffs to invoke other statutes of longer time space was addressed by the Fifth Circuit and the cases then and now relied upon were found to be readily distinguishable (722 F.2d at 136-137).

Plaintiffs were simply unable to fit the case by analogy into any category that was not within the coverage of either the one-year or the six-year statute or both.

The new Mississippi cases cited by petitioners as authority are two from the District Court for the Southern District of Mississippi (Judge Dan M. Russell, Jr.), being *Lonnie Lee Cuevas v. Nationwide Mutual Fire Ins. Co.* (unreported) and *Ray Harris v. Combined Ins. Co. of North America* (unreported) (Apx. pp. 55a-70a), both being actions for the tortious breach of insurance contracts and claiming entitlement to "punitive damages". The Court declined to apply the one-year statute because under Mississippi law "punitive damages" could rest upon "gross negligence" and were not dependent upon the existence of an "intentional tort". These cases have no application here.

V.

The Correct "Accrual" Rule Was Applied

The lower Courts found that the cause of action "accrued" on February 22, 1972, when the land sale from petitioners was closed by execution of the land deed in exchange for the $100,830.00 in cash and the services of petitioners' attorneys terminated.

Here the Court applied the federal rule, holding that the action accrued when petitioners knew or had reason to know of the injury which is the basis of the action. *Cox v. Stanton*, 529 F.2d 47 (CA 4, 1975); *Lavellee v. Listi*, 611 F.2d 1129 (CA 5, 1980). The Fifth Circuit found that the District Court properly found this accrual time to be February 22, 1972. This was based on the uncontroverted facts that at that time petitioners were convinced in their own minds that they had been tricked and defrauded by all concerned, including their own attorneys.

VI.

The Correct "Tolling" Rule Was Applied

Petitioners have asserted that the running of the statutory time was tolled by "concealed fraud". But the admissions of petitioners in the course of their deposition testimony showed without question or contradiction that petitioners knew on February 22, 1972, substantially all of that which they now assert and the lower Courts so found (722 F.2d at 137-138). Besides this, petitioners filed a formal Complaint with the Mississippi State Bar in 1975, making substantially the same claims as now form the basis of the present action, and still continued to delay action until February 16, 1979 (722 F.2d at 138). The Fifth Circuit concluded:

> ". . . We do not find that the plaintiffs have raised a fact issue of fraudulent concealment within Miss. Code Ann. §15-1-67 (1972)." (722 F.2d at 138)

The attorney-client relationship between plaintiffs and their attorneys (Neely and Barbour) ended on February 22, 1972, and there is not even a claim that the attorneys concealed anything after that date. A series of new attorneys advised with plaintiffs after February 22, 1972.

VII.

Application of State Statutes of Limitation Does Not Adversely Affect Policies of Civil Rights Legislation

This subject was dealt with by the Court in *Board of Regents v. Tomanio,* 446 U.S. 478, 100 S.Ct. 1790 (1980). Applying a state statute of limitations in an action under the Civil Rights Act of 1871 and citing *Robertson v. Wegmann,* 436 U.S. 584, 98 S.Ct. 1991 (1978), the Court said:

> ". . . The Court went on to identify two of the principal policies embodied in § 1983 as deterrence and compensation. Neither of these policies is significantly affected by this rule of limitations since plaintiffs can still readily enforce their claims, thereby recovering compensation and fostering deterrence, simply by commencing their actions within three years." (100 S.Ct. at 1797)

Not only in the case at bar did the petitioners wait more than six years to file this action, but they stood by, without complaint, and watched Yazoo County place valuable improvements on the land. (See Opinion of District Court, quoted supra).

VIII.

The Case Was Ripe for Summary Judgment

Petitioners make many assertions in the Complaint, most of which are conclusory only. Counsel continues to make and even expand upon some of these assertions in the brief, as if same were factual, when, in truth, the facts, derived from the sworn admissions of petitioners on their own respective depositions, are just the opposite. The lower Courts plowed through the massive depositions to

harvest the uncontradicted facts relevant to the plea of the statute of limitations and relevant to the "tolling" assertion and set these forth clearly in their respective opinions.

Petitioners cannot refute the uncontroverted summary judgment evidence by merely pointing to allegations in the pleadings. As stated in *First Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 88 S.Ct. 1575 (1968):

> ". . . What Rule 56(e) does make clear is that a party cannot rest on the allegations contained in his complaint in opposition to a properly supported summary judgment motion made against him. . . ." (88 S.Ct. at 1592-1593)

IX.

There Is No Conflict With Decisions of the Supreme Court or Other Courts

Petitioners' reliance on *United States v. Kubrick*, 444 U.S. 111, 100 S.Ct. 352 (1979) is misplaced because the facts are that plaintiffs were aware of the claimed existence and cause of injury in February, 1972. In that case, a medical malpractice suit, the Court held that when one has notice of the fact and cause of injury, the "accrual" of a claim need not await awareness by the plaintiff that his injury was wrongfully inflicted in terms of creating a cause of action. In the case at bar, plaintiffs knew they had sold their land and knew its value as well as anyone could know it and knew that they had been persuaded to sell over their protests. As to the alleged wrongful action of the defendants, Mrs. Suthoff admitted that she and her co-owners were convinced at the time that the owners had been tricked and defrauded. They even said as much in their formal Complaint to the State Bar in 1975, after

which the one-year statute ran four times over and there was several years grace left in the six-year statute before the action became barred.

Finally, *Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018 (1949) does not support petitioners' case. This case was an action under the Federal Employers Liability Act for disability resulting from silicosis, which manifested itself only after thirty years of exposure to silica dust. The Court held that the cause of action accrued when the accumulated effects manifested themselves. There is no analogy to the case at bar, because the plaintiffs knew in February, 1972 substantially all that they now allege as the basis for their alleged cause of action, and the lower Courts so held. If they had any injury, it manifested itself in February, 1972 when the owners gave a deed in exchange for $100,830.00, which they have not offered to return and they have continued to retain and use.

Petitioners seem to rely heavily upon *Harrison v. United States*, Appendix pages 71a-92a, a Fifth Circuit opinion decided July 5, 1983. This was another medical malpractice case where the cause of plaintiff's physical problem was hidden from view and hence undiscoverable by reasonable effort. It is a factual stranger to the case at bar and because of this, was not followed by the Fifth Circuit in the instant case, where the plaintiffs had full knowledge of what they now alleged to be the "fault" of defendants. It was not necessary that plaintiffs view the "fault" as legally actionable at the time that the sale was closed in 1972. As pointed out in *Harrison v. United States*, supra: "The plaintiff need not have knowledge of fault in the legal sense for the statute to begin to run. . ." (Apx. p. 87a) See also *United States v. Kubrick*, supra.

X.

There Are No Questions Which Warrant Review

Petitioners argue the case much as they did before the Court of Appeals and make no serious attempt to explain why the merits of the several contentions should be reviewed by this Court.

Therefore, we can say in response only that the Court of Appeals determined (1) that certain facts were established; (2) that the facts relevant to the narrow limitations issue were uncontroverted and no genuine issue there as to remained; (3) that certain legal standards were settled for dealing with the issues and (4) that the law resulting from the application of those standards, when applied to the facts, justified entry of a summary judgment of dismissal.

There are no new principles to announce or novel issues to resolve. The lower Courts simply selected a state statute to borrow by finding the one most analogous and resolved the "tolling" contention on the basis of the uncontested facts. In short, petitioners have not pointed to any "special or important reasons" for granting the writ, especially since the decision is well supported by reason and authority.

CONCLUSION

The respondents respectfully submit that the Petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

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